should there be any doubt, such doubt ought go to favour of the accused.

The accused's defence was that of a bare and barefaced denial; the sum total of her evidence being a tenuous and feeble attempt to shift blame for the offence to her son PW10 directly, and to Cheah Phaik Khim, by implications and suggestions. The latter was alleged to have held the keys to all the rooms upstairs; and PW10 was alleged to have been the sole occupier of room no.3. Yet significantly, the accused fell short of saying that the drugs belonged to either of the two of them.

Even without the accused's cautioned statement, which was rejected by this Court as not being made voluntarily, this Court is nevertheless satisfied beyond doubt that this woman had run a den of drug trafficking sons not unlike the character of Mr. Figgins with his den of pick-pockets - in "Oliver" - only in this case, it concerned not the picking of pockets, but activity much more nefarious and destructive to society. For this, the law has now exacted the ultimate penalty of death.

The outcome of this case, yet again served as a tangible demonstration of this Court's belief that, with tenacious, sagacious but wholly fair and professional prosecution, a prosecutor would hardly need to make a call on the assistance of a caution statement to secure a conviction, where probative facts warrant such verdict.

The accused was not only an author of her own misfortune but probably got all her sons involved as well; she became a grandmother and with equal distinction, caused her whole family to be wiped out in the process, considering that two of her sons died in a road accident while conveying drugs to Kuala Lumpur and the other two are now in detention on drug related offences. Indeed, any sympathy from this Court for the accused for being a grandmother, would grossly be misplaced, and against the weight of damning evidence against her. In the interest of the public this Court is duty bound to demonstrate in no uncertain terms, that the law as it falls, for or against an accused, whoever they may be, shall be imposed regardless.

For all the above reasons adumbrated I find the accused guilty as charged in respect of all the four amended charges and pass the mandatory death sentence on her in respect of each of the four said amended charges.

PUBLIC PROSECUTOR

v.

KARIM BIN OTHMAN

HIGH COURT, KUANTAN
DATO' HJ. LAMIN BIN HJ.
MOHD YUNUS J.
[CRIMINAL TRIAL NO 47-1 of 1990]
20 OCTOBER 1993

CRIMINAL PROCEDURE: Witnesses - Section 425 Criminal Procedure Code - Application to call a witness already offered to the defence - Whether evidence of witness essential to the just decision of the case - Whether examination thereof tantamount to the prosecution "reopening" its case - Principles to be applied.

CRIMINAL PROCEDURE: Discretion of Court to recall witnesses - Section 425 CPC - Circumstances for exercise of discretion - Whether discretion exercisable at any stage of proceeding.

EVIDENCE: Information leading to discovery of facts - Section 27 Evidence Act 1950 - Admissibility - Whether information given led to discovery - Whether police had prior knowledge of existence and whereabout of cannabis.

EVIDENCE: Statement from the dock - Bare denial - Whether trial Judge dutybound to convict - Evidence of accused silent on incriminating evidence of two plastic bags containing cannabis found on his person - Whether fatal.

WORDS AND PHRASES: "essential to the just decision of the case" - Section 425 Criminal Procedure Code.

The accused in this case was charged with two offences under s. 39B(1)(a) Dangerous Drugs Act 1952 (Revised 1980) for trafficking in cannabis for which has defence had been called in respect on both charges. The evidence showed that the police party, soon after arresting the accused and seizing two plastic bags containing cannabis from his person, started to interrogate the accused in which a question was put to the accused thus " Ada lagi tak baki ganja yang awak simpan" to which the accused replied " Saya ada simpan baki ganja dalam seluar di tepi dinding dan bawah kayu di tepi pondok". As a result of this information cannabis were discovered by the police from a pair of trousers hanging on the outside wall of a hut situated some 15 metres from the place of interrogation. And likewise, from beneath a heap of wood under the said hut, more cannabis were discovered by the police.

At the close of its case the prosecution had offered certain witnesses to the defence, including one Constable Mazlan, who happened to be the man in charge of the store in which the steel cabinet containing the seized cannabis was placed. However, before the defence decided whether to accept the witnesses or not, the learned Deputy applied to the Court under s. 425 CPC to call and examine Constable Mazlan as his evidence, according to the learned Deputy, was " essential to the just decision of the case".

The accused gave evidence from the dock and raised a defence which amounted to a bare denial of the evidence tendered by the prosecution and the questions that arose were:

(1) Whether s. 27 of the Evidence Act 1950 applied to the discovery of cannabis under the pile of wood and from the pair of trousers or whether the police had prior knowledge of the existence and whereabout of the said cannabis thereby rendering s. 27 inapplicable.
(2) Whether the failure of the prosecution to examine Constable Mazlan had caused a break in the chain of evidence and in any case, whether in the circumstances the Court ought to invoke s. 425 CPC and allow the prosecution to examine Constable Mazlan.
(3) Whether by reason of the fact that the defence was only a bare denial, the Court was left with no choice but to find the accused guilty as charged.

Held:

[1] The discretion whether or not to invoke s. 425 CPC is entirely with the Court and the discretion is exercisable at any stage of a proceeding. On the words of the said section, the only precondition to satisfy is that the evidence to be adduced must appear to the Court to be essential or necessary to the just decision of the case, either the case for the prosecution or the defence. Notwithstanding that, and notwithstanding the fact that the discretion given to the Court is a wide one, if the evidence of the witness to be called or recalled would give a completely different colour or a different twist to the case, then s. 425 is inapplicable.

[2] In this case Constable Mazlan was mentioned in the testimony of the Investigating Officer (PW4) who described the role that Mazlan played. If Constable Mazlan's role as described by PW4 was vital to the case for the prosecution and that the calling of Constable Mazlan was only to confirm his role and perhaps with necessary details, then s.425 would be the answer as Mazlan's evidence would be essential to the just decision of the prosecution case.

[3] The evidence showed that despite being in charge of the store in which the steel cabinet was placed, Constable Mazlan did not have the key either to the store or to the steel cabinet. At the material time the key to the store was in the possession of the Deputy OCPD of the Anti-Drug Section and the key to the steel cabinet was with the Investigating Officer. In the circumstances, Constable Mazlan could not be said to have played a vital role and there was no necessity to invoke s. 425 CPC. The fact that he had been offered to the defence was in the circumstances sufficient.

[4] There was no gap in the case for the prosecution and neither was there a break in the chain of evidence. The evidence showed that extreme care was taken by the relevant officers in packing the exhibits and marking and sealing the various packages, wrappers and envelops thus ensuring a watertight identity of the exhibits. The failure to call Constable Mazlan or for that matter the Pengarah, Jabatan Kimia, had not caused a break in the chain of evidence as there was no evidence that any of them had ever handled the exhibits.

[5] There is no doubt in the veracity of the chemist's evidence. No part of his evidence could be exposed to the inference that it was the result of an afterthought. From his evidence it was clear that resin was present and had not been extracted from the exhibits. Accordingly the definition of "cannabis" appearing in the Act had been satisfied.

[6] From PW3's question "ada lagi tak baki ganja yang awak simpan?" it cannot be assumed that the police had prior knowledge that the accused had some more cannabis with him or that they had knowledge as to the whereabout of the cannabis thereafter discovered. That question was asked simply out of curiousity because PW3 had only minutes before seized from the accused two plastic bags containing the incriminating exhibits.

[7] Section 27 of the evidence Act must apply to the discovery of cannabis under the pile of wood as well as from the pair of trousers. It was

the accused who gave the information on their existence and it was he who pointed the places where the exhibits were recovered.

[8] As the accused chose not to say anything about the the two plastic bags containing cannabis seized from him, and as his defence in respect of the cannabis discovered as a result of his information was only a bare denial, the prosecution's evidence has to be taken as unchallenged. The accused has failed to rebut on the balance of probabilities the presumption of control and possession of the incriminating exhibits, and therefore of trafficking in the same.

[Accused found guilty as charged, convicted and sentenced to death].

Cases referred to:
PP v. Boo Chew Hia [1963] MLJ 33 ***(refd)***
PP v. Lin Lian Chen [1991] 1 MLJ 316 ***(refd)***
Abdullah Zawawi v. PP [1985] 2 MLJ 16 ***(dist)***
Teoh Hoe Chye v. PP [1987] 1 MLJ 220 ***(dist)***
Yeap Teong Tean v. PP [1987] 1 MLJ 220 ***(dist)***
PP v. Abdul Hamid [1969] 1 MLJ 53 ***(refd)***
PP v. Phon Nam [1988] 3 MLJ 415 ***(refd)***
Ramli B. Kechik v. PP [1986] 2 MLJ 33 ***(refd)***
Phon Nam v. PP [1991] 2 MLJ 550 ***(refd)***
Mohd Osman Bin Pawan v. PP [1989] 2 MLJ ***(dist)***
Loo Keak Leong v. PP [1992] 3 CLJ 1332 ***(cit)***
PP v. Liew San Seong [1982] 1 MLJ 223 ***(dist)***
PP v. Er Ah Kiat [1966] 1 MLJ 9 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 113, 425
Evidence Act, s. 27

Other sources referred:
Blackstone Criminal Practice 1992, p. 1293 para D 14.9

For the prosecution - Mohd Yazid b. Mustafa, DPP
For the accused - Mura Raju; M/s Mura Raju & Co. (assigned)

JUDGMENT

Hj. Lamin bin Hj. Mohd Yunus J:
Before the prosecution case commenced the learned Deputy Public Prosecutor tendered two amended charges which read as follows:

Pertuduhan Pindaan (1)

Bahawa kamu, pada 20 November 1989, lebih kurang jam 2.15 petang, di kawasan Ladang Getah, Felda Lepar Hilir Dua, Gambang, di dalam Daerah Kuantan, dalam Negeri Pahang, bagi pihak diri kamu sendiri, telah mengedar dadah berbahaya, iaitu ganja sebanyak 665 kartus berat bersih 370 gram, dan dengan itu kamu telah melakukan suatu kesalahan di bawah s. 39B (1)(a) Akta Dadah Berbahaya 1952 (Disemak 1980) dan boleh dihukum di bawah s. 39B (2) Akta yang sama.

Pertuduhan Pindaan (2)

Bahawa kamu, pada 20 November 1989, lebih kurang jam 2.30 petang, di sebuah bangsal, di kawasan ladang getah, Felda Lepar Hilir Dua, Gambang, di dalam Daerah Kuantan, dalam Negeri Pahang, bagi pihak diri kamu sendiri, telah mengedar dadah berbahaya, iaitu ganja sebanyak tiga bungkusan berat bersih 901 gram, dan dengan itu kamu telah melakukan suatu kesalahan di bawah s. 39B (1)(a) Akta Dadah Berbahaya 1952 (Disemak 1980) dan boleh dihukum di bawah s. 39B (2) Akta yang sama.

The case for the prosecution briefly is as follows:

At about 6.00 p.m. on 19 December 1989, a male Malay came to see Cpl. Zainal Abidin (PW4) at Gambang Police Station and gave him certain information to the effect that a male Malay was trafficking ganja in a rubber plantation in Felda Lepar Hilir Gambang. PW4 asked the informer to show him the place. Both of them then proceeded on their respective motorcycles and headed for Felda Lepar Hilir Dua. On arrival, they entered an unmetalled road and proceeded on for about 2 kilometres and came to a T-junction where they stopped and parked their motorcycles. There the informer pointed to a wooden signboard carrying the name "Karim B. Othman". Then he brought PW4 somewhere to the end of that particular part of the rubber plantation where he stopped and pointed to PW4 a hut about 200 metres from where they were standing. The name on the signboard was the name of the owner of that of the plantation and the hut was still within that part of the plantation. It was believed that the hut was being used for trafficking ganja. After they left the plantation, PW4 returned to his station and informed his superior Sgt/Major 55216 Mohd. Yusof b. Che Hassan who directed him to contact any officer at Police District Headquarters Kuantan (otherwise hereafter referred to as IPD Kuantan). He managed to contact Insp. Abdul Rashid B. Harun (PW3) by phone and gave him the information which he obtained from the informer. Insp. Abdul Rashid told him to await his arrival at the

police station at about 4.00 a.m. At about 4.20 a.m PW3 and his party arrived at Police Station, Gambang and he gave a briefing to all those taking part in the operation. He divided the party into 3 groups, namely ambush party (kumpulan serbuan), observation party (kumpulan pemerhati), cut-off party (kumpulan cut-off).

Immediately after the briefing, they left for the said rubber plantation of the Felda Lepar Hilir Dua. Upon arrival at the unmetalled road entering into the Felda Scheme, PW4 requested Insp. Rashid (PW3) to stop the van they were travelling and then all eight constituting the party alighted. They were:

1. Insp. Abdul Rashid B. Harun (SP3)
2. Const. 65723 (now Corporal) Angkashah B. Md. Balmi.
3. Const. 73081 Hashim B. Lebar
4. Const. 97298 Kamarulzaman B. Awang
5. Const. 111115 Hamzah b. Hassan
6. Sgt/M. Mohd Yusof B. Cik Hassan
7. Cpl. 68368 Zainal Abidin B. Mamat (PW4).

After they had alighted, Insp. Rashid (PW3) instructed the driver to return to Gambang Police Station where he was to stand-by to await further orderd. The police party then made their way on foot to the rubber plantation where the trafficking of ganja was believed to be taking place. On arrival, PW4 pointed to PW3 the same hut he had been shown earlier. Then PW3 instructed all his men who had been divided into 3 groups to take up their positions in the bushes there. The ambush party comprising of Const. Angkashah, Const. Hamzah lead by PW3 himself took its position in the bushes about 50 metres from the hut. The observation party was solely the responsibility of PW4 who took up his position about 25 metres to the left of PW3. The cut-off party took up its position about 30 meters behind PW3, it was led by Sgt Yusoff and made up of Const. Hashim and Const. Razak. It was then between 5.30 a.m. and 5.45 a.m. Then at about 10.00 a.m., PW3 and PW4 saw a female rubber tapper tapping a tree nearest to PW3 or about 10 to 15 meters from PW4. At about 12.00 noon both PW3 and PW4 saw a male Malay boy about the age of 12 collecting latex from the rubber trees tapped earlier. At about 1.40 p.m. PW4 approached PW3 requesting permission to climb a rubber tree in order to make observation from there. With the permission of PW3, PW4 then climbed a rubber tree about 25 metres away from PW3. At about 2.00 p.m. PW3 and PW4 heard the sound of the engine of a motorcycle and at the same time PW4 signalled to PW3 indicating that a motorcycle was approaching. PW4 saw a male Malay riding a motorcycle heading for the hut. About 15 metres before reaching the hut he stopped his motorcycle and parked it there. He then walked towards the left of the hut and then he was out of sight of PW4. Soon after the same male Malay reappeared and walked towards the hut with something under his armpit. He then went up the hut and PW4 could not see him anymore. About 10 minutes later, he reappeared and walked away from the hut carrying two plastic bags, one red and the other white in colour and heading towards the motorcycle. At that time PW4 threw a rubber seed towards PW3. When PW3 looked up at him he then gave the signal to ambush. PW3 together with Cpl. Angkashah and Const. Hamzah came out of hiding and rushed towards the hut and as they did so, PW3 saw a male Malay heading towards a motorcycle about 20 metres away from the hut. At that time the male Malay was about 10 metres from the said motorcycle. When the male Malay saw PW3 and his party running towards him, he then started running. PW3 then shouted at him, “Kami polis, jangan lari,” but he continued running towards the road leading into the plantation. While he was running, he turned his head several times looking at PW3 and his party chasing after him and then he fell down. After he, the suspect fell down PW3 grabbed him and still holding the two plastic bags one red and the other white. PW3 then seized the two plastic bags and handcuffed him. He was then brought to an open space in front of the hut. In the presence of the suspect, the accused in this case, PW3 opened the red plastic bag and in it he found something wrapped in a newspaper. He opened the newspaper wrapper and in it he found 503 paper rolls (P6) each containing dried leaves believed to be cannabis. After that he examined the white plastic bag (P8) with the words "Felda Niaga" on it. In it he found 160 paper rolls (P9) each containing dried leaves believed to be ganja (cannabis). After that according to PW3, he cautioned the accused under s. 113 of the Criminal Procedure Code. After that he asked the

accused a number of questions and one of which was:

Ada lagi tak baki ganja yang awak simpan?

The accused replied:

Saya ada simpan baki ganja dalam seluar di tepi dinding dan bawah kayu di tepi pondok.

PW3 then asked the accused to point out the places he mentioned. They were about 15 to 20 metres from the hut. The accused then brought them to the hut. At the hut the accused pointed to PW3 to a pair of blue coloured trousers hanging from a wall of the hut on the outside. PW3 told the accused to take it (Pl9) down, the accused did so and handed it to PW3. PW3 examined it and he recovered from the trousers (Pl9) dried plants and leaves believed to be cannabis (P13) wrapped in a newspaper (P12). PW3 again asked the accused "Mana lagi?". The accused told him "Bawah tu" at the same time with his hand pointing to a heap of pieces of wood under the hut. PW3 then told the accused to take it out himself. The accused then squatted down and he first removed a red coloured tin from the heap of wood. After that he put his hand underneath the heap of wood and pulled out a pair of dark blue, almost black pair of trousers, bundled up and handed it to PW3. PW3 in the presence of the accused opened the bundled-up trousers (P21) and in them a white plastic bag (P15) with the words "Pasaraya Bintang, Kuantan" printed on them. In it PW3 found two more plastic bags (P16A & B) red in colour. In the two plastic bags PW3 found dried leaves believed to be cannabis.

After that PW3 directed Cpl. Zainal (PW4) to fetch the police van which was on stand-by at Gambang Police Station. PW4 left for Gambang on the accused's motorcycle.

After finding the two red plastic bags (P16A and B) PW3 asked the accused again "Ada lagi?". The accused answered "Tak ada dah". After that PW3 directed all his men to search the hut, but found nothing incriminating. He also examined the accused's body and found a small abrasion somewhere on the left shin bone which PW3 believed it was the result of his fall. After that the police party made their way out of the area on foot together with the accused. PW3 carried all the exhibits himself. While on their way out, Cpl. Zainal arrived with the police van and all boarded it and left for the accused's house at No. 107 Felda Lepar Hilir Dua. PW3 sat beside the driver and put all the exhibits on the floor near his feet. On arrival everyone including the accused alighted. PW3 then closed and locked all doors to the van as the exhibits were in the van and directed that Cpl Zainal (PW4) was to stand guard. Except for PW4 and the driver of the van, the rest of the police party together with the accused went into the accused's house and a search of the house was conducted under the direction of PW3. Nothing incriminating was found. After that the whole police party together with the accused boarded the van once again and returned to Gambang Police Station arriving at about 4.00 p.m. At the police station PW3 checked all the exhibits in the presence of the accused and then he prepared a search list (P32) and handed a copy to the accused. After that he lodged a police report vide Gambang Report No.6271/89. Having done that he handed over the accused and all the exhibits to Insp. Azman B. Omar (PW7) the Investigating Officer. Immediately upon receipt of the exhibits, PW7 checked them in the presence of PW3. The accused was also with them. After that PW7 packed all of them into packages and envelopes and marked each of them from 'E' to 'J'. On every envelope or package PW7 wrote down Gambang Report No. 6271/89 and IP No. 1431/89 together with the police seal PDRM 215 and then kept them in a steel cabinet and held the key himself. He also instructed Const. 97298 Kamarulzaman to take the accused to the General Hospital, Kuantan in order to take his urine sample. He received the accused's urine sample in a bottle already sealed by the said hospital. He then put it in an envelope and marked it with the letter 'K' and then kept it in the same steel cabinet. He locked and the key was all the time with him.

PW7 first marked P6 (503 rolls) and then wrapped them in a newspaper (P5) and put them into a red-coloured plastic bag (P4). After that he packed it and marked the package 'E'. Similarly he packed P9 (162 rolls) into a plastic bag (P8) and put it into the same package marked 'E' (P3). The 665 rolls were made the subject matter for the first charge and they were confirmed by the Chemist (PW1) to contain 370 grammes (nett) of cannabis.

As to P13 (dried leaves and plants) PW7 wrapped it with a newspaper (P12) and put it lnto an envelope which he marked 'P' (P11). This was confirmed by the Chemist (PWl) to contain 55 grammes (nett) of cannabis. As regards the two red plastic bags (P16A & B) which contained dried leaves and plants, PW7 wrapped them (P15) and then packed it and marked the package 'G' (P14). This was also confirmed by the Chemist (PW1) to contain 346 grammes (nett) of cannabis. The cannabis in package 'F' (P11) and in package 'G' (P14) formed the subject matter for the second charge.

At the close of the case for the prosecution and after the learned Deputy Public Prosecutor offered certain witnesses to the defence, but before the learned defence Counsel made his decision to accept or not to accept any of the witnesses offered to him, the learned Deputy Public Prosecutor applied to the Court under the provision of s. 425 of Criminal Procedure Code to allow him to call one of the witnesses he had just offered to the defence in the person of Police Constable Mazlan b. Mustafa. It may be noted at this stage that Constable Mazlan's name was mentioned for the first time by the Investigating Officer (PW7) when he was cross-examined about the store where exhibits were kept. Constable Mazlan was referred to again in re-examination when the Investigating Officer was asked as to who had the key to the store. According to the Investigating Officer, the store was in the charge of Constable Mazlan but the Deputy OCPD of the Anti-Drug Section held the key to the store.

The learned Counsel for the defence objected to the learned Deputy Public Prosecutor's application.

Section 425 of the Criminal Procedure Code reads:

> Any Court may at any stage of any inquiry, trial or other proceeding under this Code summon any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine any person already examined, and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case.

The learned Deputy Public Prosecutor cited some authorities and urged me to use my discretion to grant his application on "the just decislon of the case." In the case of *PP v. Boo Chew Hia* [1963] MLJ 33, a prosecution witness appeared to have been allowed by the learned Magistrate below to be recalled at the end of the case for the prosecution. When the case came up again before him for continued hearing, the trial Magistrate acquitted the respondent without his defence being called on the ground that it was highly irregular for the witness to have been recalled. Ali J., the appellate Judge thought the trial Magistrate by granting leave to recall the witness the respondent would be prejudiced in his defence. In effect Ali J. said that the Magistrate was exercising his power under s. 425 of the Criminal Procedure Code. He allowed the appeal by the Public Prosecutor for the reason that by "merely recalling a witness is not in itself an irregularity." He further said:

> The Law permits a witness to be recalled whenever it is essential to the just decision of the case.

The case of *PP v. Lin Lian Chen* [l991] l MLJ 316 concerned an application by the prosecution before Kuala Lumpur High Court to recall PW2 (the Chemist) at the close of the case for the prosecution by invoking s. 425 Criminal Procedure Code in order to adduce further evidence for the purpose of establishing the qualifications of PW2 as an expert. Mohtar Abdullah J. refused the application and said:

> It is not just and fair to allow the prosecution, after it has closed its case, to make emergency repairs to defects in its case caused by its own lack of care.

The learned defence Counsel in his opening submission cited **Blackstone Criminal Practice 1992** at page 1293 para D 14.9 thus:

> If the witness is likely to be adverse to the defence and the prosecution have already closed their case, the judge should not use his power so as to circumvent the restrictions on the prosecution *reopening* their case (Cleghorn [1967] 2 QB 5B4). (Underline is mine)

It may be noted that there is no provision in the English law similar to s. 425 of our Criminal Procedure Code. Also the word "reopening" in the *Cleghorn's* case above must be carefully noted. I need only say at this stage that to call or recall a witness merely to confirm or otherwise certain aspect of the

prosecution's case certainly does not amount to "reopening" the case. Neither is there a provision in the Indian Criminal Procedure Code in *para materia* with s. 425. He continued by citing the case of *Abdullah Zawawi v. PP* [1985] 2 MLJ 16 when the Supreme Court was asked to decide on a reference the question as to the extent of the prosecution's right to call witnesses from whom statements have been taken. In this case the applicant was convicted of an offence of CBT and sentenced to 18 months imprisonment by the Kuala Lumpur Sessions Court. His appeal to the High Court was dismissed. This case is certainly not relevant to the facts of the case before me.

For the same reason I did not consider the ratio in the case of *Teoh Hoe Chye v. PP* and *Yeap Teong Tean v. PP* [1987] 1 MLJ 220. On the other hand in the case of *PP v. Abdul Hamid* [1969] 1 MLJ 53, after the accused had made his defence, the Magistrate below called two witnesses as Court witnesses and after hearing their evidence he acquitted the accused and the public prosecutor appealed. Syed Othman J. (as he then was) set aside the order of acquittal and substituted therefor an order of a finding of guilty. The learned Judge observed that undoubtedly s. 425 of the Criminal Procedure Code gave the Court a very wide power but it must be exercised "with the utmost caution" and that the evidence to be received must appear to the Court "essential to the just decision of the case." He further added that in "a criminal trial at the close of a case of any party, the Court should not call any witness unless there is a strong and valid reason." He found no such reason for calling the two Court witnesses. However, the learned Deputy Public Prosecutor in the present case relied heavily on the case of *PP v. Phon Nam* [l988] 3 MLJ 415. The Public Prosecutor in this case appealed against the order of acquittal and discharge without the defence being called made by the Alor Star High Court in respect of a charge preferred against the respondent for trafficking in heroin. Briefly if I may advert to the facts which resulted in the acquittal of the respondent were that DPC Yunan who served the chemistry's reports on the respondent who acknowledged their receipt was not called by the prosecution to testify nor was he offered to the defence at the close of the prosecution case. At the point when the prosecution closed its case the learned trial Judge drew the learned Deputy Public Prosecutor's attention to the fact that DPC Yunan had not given evidence whereupon the learned Deputy Public Prosecutor applied for leave under s. 425 of the Criminal Prosedure Code for the Court to summon DPC Yunan. The learned Defence Counsel objected. After hearing arguments the learned Judge upheld the defence objection, refused the application and acquitted and discharged the respondent without his defence being called. According to the learned Judge that it was due to the oversight on the part of the prosecution to call DPC Yunan that resulted in the prosecution's failure to prove the case. On appeal, the Supreme Court explained the purport of s. 425 and in fact recalled its previous decision in the case of *Ramli B. Kechik v. PP* [1986] 2 MLJ 33 where it said that for the exercise of the discretion by the Court:

> the main consideration being the essentiality of the additional evidence to a just decision of the case. If there is the apprehension of justice failing by an erroneous acquittal or by an erroneous conviction the Court would be justified in exercising its discretion in calling for additional evidence under this section.

The Supreme Court, in the case under discussion said that the facts of the case did not justify the refusal by the learned Judge and so ordered it to be remitted back for the Court to invoke s. 425 of the Criminal Prosedure Code. Upon being remitted back to the High Court, the learned trial Judge invoked s. 425 and allowed DPC Yunan to be called and to testify on the service of the chemist's reports on the respondent (Phon Nam) and then called him to enter his defence. At the end of the defence case, he found the respondent guilty and convicted and sentenced him to death. As a result the respondent appealed to the Supreme Court as appearing in the case of *Phon Nam v. PP* [l991) 2 MLJ 550, the decision of which is being relied upon by the defence in the present case before me. Phon Nam, now appellant, in his appeal contended through his Counsel that the proper service of the relevant chemist's reports was not proven notwithstanding that DPC Yunan had testified. What had happened was that the endorsement at the back of the report dated 8 February 1984 referred to a report dated 14

February 1984 and the said report dated 14 February 1984 was never produced. The learned Deputy Public Prosecutor applied for DPC Yunan to be recalled and was allowed. Upon recall, DPC Yunan repeatedly said that he could not remember if copies of the two chemist's reports were served on the appellant. However, the Supreme Court in the second appeal allowed the appeal and quashed the conviction of *Phon Nam* [1991] 2 MLJ 550]. The Supreme Court reminded us of its explanation on s. 425 in its earlier judgment and the one in the *Ramli's* case. It however went on to say:

> The discretion is never intended to make emergency repairs' to the prosecution case as correctly stated by Mohtar Abdullah J. in *PP v. Lin Lian Chen*.

In the second appeal of *Phon Nam's* case, it concerned the recall of a witness (the same DPC Yunan) while in the first appeal it concerned the calling of a fresh witness (DPC Yunan) though his name was mentioned by a prosecution witness, the Investigating Officer and he was not even offered to the defence. In the *Lin Lian Chen's* case, also it concerned the recall of a prosecution witness, the chemist (PW2). It may be argued that the purpose of calling or recalling a witness under s. 425 is in fact to make "emergency repairs" and if the discretion is never intended for the purpose of making "such repairs", then the prosecution will never benefit from s. 425 and for that matter too, the defence as the case may be. Two things are clear in regard to the operation of s. 425. One, this provision can be made available at any stage of a proceeding and that includes both at the end of the case for the prosecution and at the end of the case for the defence and the exercise of that discretion is with the Court. Two, a fresh witness may be called or a witness who has already given evidence before may be recalled for further examination either at the end of the case for the prosecution or for the defence. The condition that must be fulfilled is that, "if his evidence appears to it (the Court) essential to the just decision of the case." The word "essential" means necessary to the existence of a thing. So the evidence that is to be adduced just appear to the Court **necessary** "to the just decision of the case" meaning either the case for the prosecution or for the defence. Of course, the discretion must be exercised judicially. Counsel for the defence submitted that the defence amongst other things was relying on a break in the chain of evidence in the case for the prosecution and that the calling of Constable Mazlan will close the gap. As a result by allowing the application the line of defence for the accused would be destroyed. It was mainly on this ground that the defence Counsel prayed for s. 425 not to be invoked. With respect I do not think that that would be the correct approach. In our case, Const. Mazlan was mentioned by a prosecution witness (the Investigating Officer) and that witness also described the role Mazlan played. If Const. Mazlan's role as described by the said witness was vital to the case for the prosecution and that the calling of Const. Mazlan was only to confirm his role and perhaps with necessary details, then s. 425 would be the answer, as Mazlan's evidence would be "essential" to the just decision of the prosecution case. But if the evidence of the witness to be called or recalled would give a completely different colour or a different twist to the prosecution case, to resort to s. 425 in such a situation might not be proper. I however, did not allow the prosecution's application for a different reason. Mazlan did not have the key to the store. While the exhibits in this case were kept in a steel cabinet and the key to the said cabinet were all the time with the Investigating Officer, Insp. Azman (PW7) for he said, "Kuncinya sentiasa berada dengan saya." In the circumstances, Const. Mazlan's evidence would not play a vital role and that he had been offered to the defence which was sufficent and therefore, it was not necessary to call him to give evidence for the prosecution.

Now on the evidence, the learned Defence Counsel submitted that the prosecution had not proved its case for the following reasons:

Firstly, he said there had been a break in the chain of evidence pertaining to the exhibits, i.e. the cannabis, the subject matter of the charge. While the cannabis was with the chemist (PW1) for the period from 21 November 1989 to 10 January 1990, it was being kept in a locked cabinet and the cabinet was in the strongroom. PW1 was in control of the strongroom and he had the key to the strongroom and also knew its combination. The other officer who had the key to the strongroom and also knew its combination

was his Pengarah, En. Hoong Seng Hon. Another chemist, named Othman, only knew the combination to the strongroom but he did not have the key. PW1 said that his Pengarah was not involved in the analysis of the exhibits. His Pengarah had spare key to the cabinet. The learned defence Counsel argued that because En. Hoong Seng Hon had not been called, there was a break in the chain of evidence. I say there was no break in the chain of evidence because the Pengarah was not involved in the analysis and therefore, he never handled the exhibits. It served no useful purpose to call him as a witness because he would only corroborate PW1's evidence and corroboration was not necessary as I had accepted PW1's evidence. If there had been evidence to the effect that the Pengarah had handled the exhibits then certainly there would have been a break in the chain of evidence in the circumstances.

The learned Defence Counsel also argued that the failure to call Constable Mazlan and ASP Zulkarnain bin Abdullah Rahman had caused a break in the chain of evidence. There was no evidence that anyone of them handled the exhibits. The key to the steel cabinet where the exhibits were kept was all the time with the Investigating Officer (PW7) and from the time he received the exhibits to the time of the trial, he was all the time attached to the station, meaning that he had not at any time been transferred out and also there was no question of handing over the exhibits to any other officer. PW7 also said that after he received the exhibits from the chemist on 10 January 1990, he brought them back and he, himself kept them in the store "dalam keadaan berkunci hingga hari bicara kes ini" and by this it was crystal clear to me that they were placed in the steel cabinet in the store and the key to the cabinet was with him all the time as he had earlier testified. Both Constable Mazlan and ASP Zulkarnain were offered to the defence.

The learned Defence Counsel cited a number of authorities and so did the learned Deputy Public Prosecutor. For the present purpose, I propose to look only at one or two them. In the case of *Teoh Hoe Chye v. PP* [1987] 1 MLJ 220 the Supreme Court reversed the decision of the trial Judge as it found that there was a break in the chain of evidence in failing on the part of the prosecution to call Supt. Lum, the Investigating Officer to whom PW2 handed the exhibits (drugs) before the chemist came to conduct the initial test. There were a number of questions that needed answers such as what did Supt. Lum do with the exhibits after he received them: where did he keep them etc. Abdul Hamid CJ as he then was, delivering the judgment of the Court said (page 229):

> We would observe at this point that the law is clear in that 'it is unnecessary to call evidence to ensure there is no break in the chain of evidence.' (*Su Ah Ping v. Public Prosecutor*). But where a doubt as to the identity of an exhibit arises, a failure to adduce evidence to provide the necessary link in the chain of evidence would be fatal to the prosecution case. In the instant case there was such a failure.

In the case of *Mohd Osman Bin Pawan v. PP* [1989] 2 MLJ, the Customs Officer who counted the exhibits in the presence of the appellant was not called to give evidence but instead he was made available to the defence. In this case, according to PW7, he received from PW3 a total of 4,300 rolls believed to be cannabis and after having them packed and sealed, he sent them to the Chemist. Whereas according to the Chemist, he received a total of 4,296 rolls. Here, there was a doubt as to the total number of rolls and the Supreme Court ruled that the Custons Officer who earlier counted the exhibits should have been called.

In the present case, I found that there was no evidence that the Pengarah, Pejabat Kimia, Constable Mazlan and ASP Zulkarnain ever handled or in contact with the exhibits and I have no doubt whatsoever as to the identity of the exhibits. They had been properly packed and sealed and kept under lock and key. I cannot help observing that in this case, extreme care has been taken by the relevant officers in particular, the Investigating Officer (PW7) and the chemist in packing the exhibits and marking and sealing the various packages, wrappers and envelopes to ensure a watertight identity. There was no gap in the case for the prosecution and neither was there a break in the chain of evidence.

The next complaint by the learned defence Counsel was that the Chemist (PWl) was not an expert. I do not need to go into this question at great length. By his qualification and his years of experience in my judgment, he qualifies to be treated as an expert. This is not the

first time he has given evidence in Court as an expert. The learned defence Counsel was questioning the way the chemist carried out his analysis such as his working sheets having no dates on them and his awareness of the case of *Loo Keak Leong v. PP* [1992] 3 CLJ 1332 so that it could open to suggestion that the evidence he was giving in Court was the result of an afterthought. I have no hesitation in saying that that was an unfair observation on the part of the defence Counsel. I have no doubt as to the veracity of his evidence. He was thoroughly cross-examined. No part of his evidence could be exposed to the inference that it was the result of an afterthought. From his evidence, I was satisfied that the tests he had carried out showed that resin had not been extracted from the exhibits. In other words, resin was present and that there was no evidence of extraction. Accordingly, the definitlon of "cannabis" appearing in the Act had been satisfied. As the offence was committed in 1989, the definition of "cannabis" for the purpose of this case is as follows:

> Cannabis means any part of any plant of the genus Cannabis from which the resin had not been extracted, by whatever name it may be designated.

The next question which merits discussion is whether s. 27 of the Evidence Act is applicable in respect of the discovery of the cannabis (P13 and P16A & B) from the pair of trousers hanging on the wall and from beneath a heap of wood under the hut in order to prove the allegation in the second charge. Having caught up with the accused after a chase and seized the two plastic bags (P4 and P5) in his hand containing cannabis (P6 and P9), PW3 handcuffed him and brought him to an open space in front of the hut where PW3 examined the content of the two plastic bags in the presence of the accused. After asking him why he (the accused) ran away, PW3 enquired further by asking, "Ada lagi tak baki ganja yang awak simpan?" The accused replied, "Saya ada simpan baki ganja dalam seluar di tepi dinding dan bawah kayu di tepi pondok." From PW3's question "Ada lagi tak baki ganja yang awak simpan?", it cannot immediately be assumed that the police already had knowledge that in fact the accused had some more cannabis in his possession. That question was asked simply out of curiousity because PW3 had only minutes before seized from the accused's hand two plastic bags containing P6 and P9. Neither can one conclude from the information received by PW4 from the informer that the police had prior knowledge of the existence of cannabis and its whereabout. In cross-examination, while PW4 and the informer were at the scene some 200 meters from the hut, the informer pointed at the hut and told PW4 and PW4 said:

> Dia kata pada saya pondok itu dipercayai digunakan untuk memproses dan mengedar dadah oleh tuan pemilik tanah ... Dia tiada beritahu sama ada ganja ada tersimpan di situ.

So the informer did not say to PW4 that there was in fact cannabis kept in the hut. To the informer it was only a matter of his "belief" (dipercayai) that the hut was being used to process and traffick cannabis. On the facts, the present case before me is not on all fours with the case of *PP v. Liew San Seong* [1982] 1 MLJ 223. We know from the evidence of PW2, that the hut is in the accused's land and it is situated about 200 meters from the "jalan yang sentiasa kita lalui." In my judgment, s. 27 of the Evidence Act must apply to the discovery of the cannabis under the pile of wood under the hut. As to the one discovered from the trousers hung from a wall on the outside of the hut, I am also of the view that the prosecution has succeeded in invoking s. 27 notwithstanding that the trousers were hung in the open. It was the accused who pointed out the trousers and I must say that it is the most unsuspecting place to keep the incriminating exhibits. Only minutes before he alone went into the hut and out again. He must explain. In the case of *PP v. Er Ah Kiat* [1966] 1 MLJ 9, s. 27 was successfully invoked in regard to the discovery of a hand-grenade buried in an open ground near a coconut tree stump behind a baber's shop. Raja Azlan Shah J. (as he then was) had this to say:

> Counsel also submitted that the hand-grenade was found in a public place and accordingly the accused had no exclusive control over the place, hence the hand-grenade. In my view, if the hand-grenade was discovered in consequence of the statement it would be evidence of his control even though the hand-grenade is concealed in a public place because unless he had control he would not have concealed it there.

I do not propose to deal with other criticisms of the learned Defence Counsel on the prosecution case, as I do not think they merit further disscussion. I was satisfied that the prosecution had proved its case before reasonable doubt and I, therefore invited the accused to enter his defence.

Having explained to the accused the three courses open to him by which to make his defence, the accused opted to make a statement from the dock. In his statement, he related all what he did on the morning of 20 November 1989 in respect of which I have no intention of making any comment for the reason that they have no bearing on the allegations in the charge. But after lunch at about 2.00 p.m. he left the house on his motorcycle and headed for his plantation again in order to continue fertilising his plants which he had begun in the morning. Upon arrival he parked his motorcycle about 15 meters to the front of his hut and he went to ease himself in the swamp nearby. After that he went up to the hut and stayed there for about 10 minutes and then he came down. After he had walked away from the hut for about 5 meters he heard a voice shouting, "Jangan lari". He stopped and turned his head and he saw many people were running towards him. On reaching him, they arrested him and asked him, “Di mana awak simpan barang?” The accused inquired, "Barang apa?". They replied “ganja”, and he denied having it. They continued their questioning by saying, "Baik awak cakap di mana awak simpan”. He replied he did not know. Then they brought him into the hut and conducted a search and found nothing incriinating. They then asked him to search underneath a pile of wood under the hut and from there he retrieved a pair of black trousers and from their fold, Insp. Rashid found a white plastic package. When he opened the package, the accused saw "ganja" leave already turned black. Insp. Rashid asked him “Di mana awak simpan barang lagi?". He replied that he did not know. After that he saw Insp. Rashid searching along the wall of the hut on the outside. Then he saw him feeling about all over him pair of trousers that was hanging on the wall. Insp. Rashid took it and from inside the trousers he recovered a plastic package red in colour. On opening the package he found a bundle wrapped with a piece of paper. He then asked the accused, “Ini barang siapa punya?”. He told the Inspector that he did not know. After that, according to the accused, the Inspector inquired as to the whereabout of his house. He accordingly led the police party to his house where a search was carried out. He said his own room, his children's room and the kitchen were searched. The police did not find whatever they were looking for. From his house, after the search the accused was taken straight to Gambang Police Station. At the police station, in a room, the accused was again asked, "Ganja ini siapa punya". The accused replied, “Saya tak tahu”.

After that he was brought to Kuantan Police Station and from there he was sent to hospital (it must be the General Hospital) where his urine sample was taken after which he was brought back to the police station where he was kept in a lock-up. After one and half days he was taken out and brought to a room for questioning. He gave a statement and after that the accused said that his body and his legs were examined. After the physical examination, he was sent back to the lock-up. Finally the accused said:

> Sebelum saya dibawa balik ke balai dari rumah saya, satu bungkusan plastik kecil berisi ganja dijumpai oleh polis. Bungkusan itu saya punya. Itu sahaja yang saya tahu.

Before I examined the accused's statement from the dock, I completely ignored his statement as I have quoted immediately above pertaining to his admission of one package of ganja because it cannot be related to the cannabis as contained in the two charges. The evidence of the only witness for the defence, one Sheikh Abd. Haiyey b. Sheikh Abd. Kadir is of no significance because it merely supports the accused's statement regarding the plants he had in his plantation for which he required fertiliser which the accused received in the morning on the day he was arrested. Accordingly, his evidence too is of no significance in this case as it relates to events that took place before 2.00 p.m. on 20 November 1989.

I must not fail to say that I too, take the view that the statement of the accused from the dock is evidence. However, as his evidence was not given on oath, it is not entitled to the same weight as sworn testimony.

The rest of the accused's statement did relate to events pertaining to the two charges. The

sum toto of that statement in my view, amounted to a bare denial.

Notwithstanding, if I may observe, the accused has not mentioned in his statement the allegation made by the prosecution about the two plastic bags seized from the accused after he was caught at the end of a chase. It must be remembered that it is a fact that from the prosecution evidence that the two plastic bags were seized and were produced in Court. As the accused chose not to say anything about it, how then could the Court properly consider his testimony as against the prosecution's allegation. Merely by making submission by his Counsel is not good enough. It is as good as making submission over nothing. The accused's position can be said to be the same as in a case where an accused is invited to enter his defence and he remains silent. In such a situation, he will then be found guilty. Similarly in this case, since the accused has not explained the finding of the two plastic bags on his person, I consider the prosecution's allegation in regard of them remains unchallenged. So in respect of the first charge, the accused has not rebutted on the balance of probabilities the presumption of control and possession and therefore, of trafficking of 370 grammes of cannabis.

As I have said that in regard to the discovery of the cannabis under the pile of wood under the hut and in the trousers hung on the wall on the outside of the house, the story of the accused was one of a bare denial. For the prosecution, s. 27 of the Evidence Act was relied upon and I accepted it. As can be seen from his own statement from the dock, to every question put to him by the police, his answer was a plain denial. When he was first asked about "ganja", he denied having it. On further questioning, he merely said he did not know. Upon discovery of the ganja under the pile of wood under the hut, he was asked, "Di mana awak simpan barang lagi?". He again replied he did not know. This was followed with the discovery of another plastic package of ganja from his own trousers hung from the wall of the hut. When asked to whom it belonged, he merely claimed no knowledge. Since the accused's story was a bare denial in respect of the discovery of cannabis in tha two places, he has accordingly failed to rebut on the balance of probabilities the presumption of control and possession and therefore of trafficking of 901 grammes of cannabis.

I therefore, found the accused guilty in respect of both charges and convicted him. Accordingly, I passed the sentence of death on the accused in respect of each of the two charges.